The External Dimension of EU Migration and Asylum Policy

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This online symposium is being held just before the ACES-Asser conference on 'Migration deals and their damaging effects', which will take place online on 8-9 October. The conference and the contributions in this symposium aim to examine the legal and policy implications of the increased informalisation of the EU's external action in the field of migration and asylum. The use of informal instruments in EU external relations is nothing new. At the same time, the increasing recourse to such instruments in the past few years has been a growing cause of concern over their potential detrimental effects on the rights of migrants and refugees, the EU's institutional balance, the rule of law, as well as the global regime for protection of refugees.

The infamous 'EU-Turkey Statement', known as the EU-Turkey refugee deal, and the 'Joint Way Forward' with Afghanistan, an informal Readmission Agreement, are two cases in point. While such instruments may provide a certain degree of flexibility as well as a convenient way of bypassing certain internal or external political hurdles, they come with their own set of problems. The choice to act outside the Treaties and to ignore the prescribed procedure for concluding international agreements results in less transparency, democratic scrutiny, accountability and legitimacy. Moreover, the increased use of informal instruments creates the danger of creating a parallel world of instruments, norms and agreements, enabling the circumvention of core EU rules. This, in turn, poses significant constitutional challenges by distorting the EU's institutional balance, leaving individuals affected by these instruments without legal protection, and ultimately weakening the global regime for the protection of rights of refugees.

The Blog Posts in this Symposium

The first two blog posts in this symposium focus on the constitutional implications of informalisation. In her blog post Caterina Molinari looks into the implications of EU readmission deals on the constitutional allocation of powers. She argues that recourse to informal instruments is particularly problematic when its primary aim is to bypass existing procedural and substantive constraints in law "rather than to improve [law] or complement it". She underlines the importance of the principle of institutional balance in this context, where the Treaties do not provide for a particular course of action or procedure. The importance of this principle in the adoption of informal instruments/soft law has also been confirmed by the CJEU (Swiss MoU). Andrea Ott approaches the same issue from a different angle and asks whether this trend of informalisation in the Area of Freedom Security and Justice can be considered as 'contamination' of EU law in the light of Case C-28/12 Commission v Council (the Commission argued the hybrid act 'contaminated' the supranational procedure

(Art. 218 TFEU and Art. 13(2) TEU) under the Treaties). She identifies the lack of privileged access by the European Parliament to such informal instruments and the fact that they are not published consistently as other problematic issues. While she thinks 'the ultimate limits set by EU competences and primacy cannot shield from these actions', she argues these actions could be monitored better, especially by the EP, so as to contain 'contamination'.

The next three blog posts look into the implications of informalisation on the protection of fundamental rights. The blog post by Narin Idriz examines whether the EU system of legal remedies is as 'complete' as claimed by the CJEU and whether it provides effective judicial protection to those affected by informal instruments adopted in the area of migration control. The case study used to that effect is the EU-Turkey Statement. The fourth contribution of this symposium by Ay#e Dicle Ergin, provides a legal analysis of the events at the Greek-Turkish border at the beginning of March this year, after Turkey announced it is opening its borders to Europe. As migrants started arriving to the border, Greece adopted an emergency decree suspending asylum applications for those entering the country illegally. The events can be considered as intrinsically linked to the EU-Turkey deal – relying on which Erdogan has threatened to 'open the gates to Europe' multiple times. The third contribution by Aysel Küçüksu problematises the absence of references to human rights in the CJEU's asylum jurisprudence, in which it heavily relies on technical formalities and the principle of the 'effectiveness' of the asylum system. Analysis of the Court's case law in this area reveals that it is more likely to rely on the *traveaux préparatoires* of a particular instrument than relying on the Treaties or the Charter of Fundamental Rights in the interpretation of that instrument. According to Küçüksu, in an area that is so politically charged the Court has to 'portray itself as the mechanical arbitrator of the law' until the legislature took steps to reform the existing system.

The last two contributions shed light on the effects of informalisation to the international system of protection of refugees. The blog post by Emanuela Roman looks at how informal migration agreements affect international responsibility sharing. According to Roman, since the 'migration crisis', the EU and its Member States have moved from 'the externalisation of migration control to the externalisation of protection responsibilities' through recourse to informal deals. This resulted in 'shifting (rather than sharing) of the 'asylum burden' further south – i.e. from southern European countries to third countries in the EU's southern neighbourhood or in the Global South'. The last blog post of the symposium by Suna Gülfer Ihalmur provides a historical account of the global efforts to provide solutions to forced displacement. Initially resettlement (between 1945-1985) and repatriation (1985-1993) were identified as preferred solutions. While returns to the countries of origin continued in the post-Cold War period, the 'war on terrorism' in the 2000s led to a paradigm shift that restricted the right to asylum and securitized and criminalized refugees. The 'migration crisis' of 2015, triggered by the Syrian conflict, was another milestone after which the Global North sought to 'manage' refugee flows and keep refugees in neighbouring countries. 'Voluntary' return schemes became popular, but 'return' at times masked the harsh reality of 'expulsion'. With the onslaught of the pandemic, countries such as the US, exacerbated the situation in less developed

countries by ‘forcibly’ returning people and thereby contributing to the further spread of the virus.

Conclusion

The contributions to this symposium demonstrate a trend in the weakening of not only the European but also the global regime for protection of refugees. Solidarity and fair sharing of responsibility are not concepts that are trendy today. What is ‘in’ is shifting responsibility, in other words externalising or outsourcing the ‘burden’ whenever and wherever possible. In the context of the EU, this practice of shifting responsibility takes place via various informal arrangements with third states which poses serious questions regarding their legality and compatibility with procedural and substantive EU rules. While initially those were justified as being ‘emergency’ or ‘crisis’ measures, they are still being used quite some years after the ‘crisis’. In the absence of Member States or Union institutions that understand the constitutional implications of these instruments and take the step to challenge them in front of CJEU, they will continue to be the order of the day.
